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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-5649

IDA VENE ARMOUR,

PETITIONER,

V.

CITY OF ANNISTON, ETC., ET AL,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The Respondents, City of Anniston, dba Anniston Memorial Hospital, and Northeast Alabama Regional Medical Center Board, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 597 F2nd 46. The denial of a rehearing en banc is reported at 604 F2nd 671.

QUESTIONS PRESENTED.

1. Were the findings of fact by the trial court, which had the opportunity to judge the credibility of the witnesses, clearly erroneous with regard to the individual claim of petitioner?

2. If the findings of the District Court were not clearly erroneous with respect to the individual claim of petitioner, was the opinion of the Fifth Circuit erroneous with respect to the

class action under the pleadings and facts of this case?

REASONS WHY THE WRITS SHOULD BE DENIED.

1. Neither the decision below nor the record raise the Questions Presented as set out in the petition.

There are four Questions Presented in the petition. The first three deal with the class action aspect of the case and the fourth relates to the individual claim of petition. This brief will first address the individual claim.

In the petition Question Presented Four places the individual claim of petition in the light of having been denied by the District Court in a finding that was not based on credible evidence. This is simply not supported by the facts. In the Findings of Fact made by the District Court there was a review consisting of several pages of the facts pertaining to the employment record of petitioner. The opinion summed up the situation as follows:

> "The court finds that, based upon the facts of this case, the defendant Hospital was justified in discharging Ida Vene Armour and that the reasons for the discharge do not indicate any discriminatory intent whatsoever. In support of this proposition, the court finds that the sworn testimony during the trial establishes that the plaintiff's poor employment record and general incompatibility with fellow employees was not the reason for the plaintiff's discharge. Further, the unfortunate circumstances surrounding the incident involving the plaintiff and another Hospital employee over the playing of the plaintiff's radio did not contribute to Mrs. Armour's dismissal, nor did the fact that a report on the incident was kept in her personnel file contribute to her discharge. Sworn testimony during the trial indicated that the informtion in Mrs. Armour's personnel file was not a factor in her termination. To the contrary, the testimony and exhibits presented during the trial indicate that the supervisors and administrators at the Hospital took a conciliatory attitude toward Mrs. Armour's poor employment record and that they attempted to provide constructive advice and help in this matter. Furthermore, following the radio incident, Mrs. Harris, the Director of Nursing Services, honored Mrs. Armour's request for a transfer to another shift."

"The court concludes further that the sole reason for the discharge of Mrs. Armour was that she abandoned her job without seeking or receiving prior permission on February 20, 1972, and that she refused to return to work unless she was transferred to another shift. The court finds that such conduct constitutes insubordination, totally inexcusable, and which need not be tolerated by any employer."

The facts pertaining to the discharge of petitioner are vastly different from the way they are made to appear in the petition, and from the way they are referred to in Question Presented Four.

The Fifth Circuit reviewed the record on appeal and wrote as follows:

"We uphold the trial court's decision that the Hospital was justified in discharging Mrs. Armour. The trial court was presented with conflicting evidence regarding the circumstances surrounding Mrs. Armour's absence from work and the Hospital's reasons for terminating her. Mrs. Armour testified that she left work and remained absent due to her inability to obtain a baby sitter. The Hospital presented witnesses who specifically refuted these facts and denied that Mrs. Armour had been excused from work on account of her responsibilities at home. Likewise, Mrs. Armour presented circumstantial evidence that her termination was racially motivated and the Hospital presented evidence that she was terminated for her failure to report for work. It is not our province on appeal to make the credibility choices necessary to decide this case. We are satisfied that there was ample evidence upon which the court could have made its finding."

It is apparent that the individual claim of petitioner lacked merit, and that it was not clearly erroneous for the District Court to make such a finding.

The "nexus" mentioned in the petition is not some new or additional requirement imposed by the Fifth Circuit for class actions. The opinion in that Court makes it clear that the requirement of nexus "is nothing more than saying that a class representative must meet all the criteria of Rule 23 (a)." This same test was required by the Supreme Court in East Texas Motor Freight

v. Rodriguez, 435 US 395, 97 S Ct 1891. In that case the Court discussed some typical class actions and added, "But careful attention to the requirements of Fed Rule Civ Proc 23 remains nonetheless indispensable."

In this case petitioner's only charge with respect to herself is wrongful discharge, yet her offer, as set out in the amendment to her complaint is to represent all members of a class composed of all black former and present employees and applicants for employment at the Medical Center, alleging a policy or practice of racial discrimination "in employment practices by the defendants."

The record shows that petitioner received employment on the job she applied for. She received every pay raise given to other employees. She had no problem as an employee. Her only complaint concerned the termination of her employment which did not involve any racial discrimination. The situation was summarized by the Fifth Circuit in this way:

"On the facts of this case, 'including the facts developed at the trial of the plaintiffs' individual claims,' Mrs. Armour has no claim in common with the other putative class members. She herself admitted that she has not been a victim of discrimination in hiring or pay. At this point in the litigation it is also clear that Mrs. Armour has not been the victim of racial discrimination in her termination. Having suffered no discrimination at the hands of the defendants, Mrs. Armour is prevented by Rule 23 from representing this class."

East Texas Motor Freight v. Rodriguez paraphrased the holding of the Fifth Circuit in this language, using the names of the parties in that case:

"In short, the trial court proceedings made clear that Rodriguez, Perez, and Herrera were not members of the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."

As pointed out by the Fifth Circuit,

> "There is no reason to expect hardship to befall putative and unknown class members. No one has come forward to join the class or to intervene on appeal. No one has been bound by Mrs. Armour's attempt to establish a class."

One would suspect that the attempt to establish a class action in this case is really more of an effort to establish an attorney's fee.

2. The pleadings and facts of this case do not call for or justify a ruling on the much broader Questions Presented in the petition, and the decision of the Fifth Circuit presents no reason for the grant of certiorari.

CONCLUSION.

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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